

***United States Court of Appeals  
for the Second Circuit***



**RESPONDENT'S  
BRIEF**





# 76-4176 and 76-4198

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**UNITED STATES COURT of APPEALS**  
**FOR THE SECOND CIRCUIT**

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KIMI SALES, LTD.,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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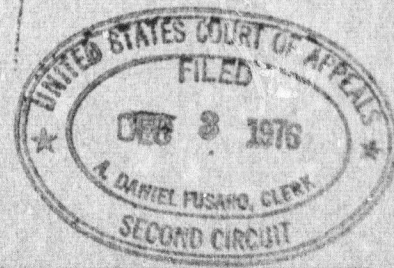
**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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BRIEF FOR  
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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company selected James Thomas for layoff and refused to recall him because he led employee efforts to obtain union representation, thus violating Section 8(a)(3) and (1) of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Kimi Sales, Ltd., (hereinafter called "the Company") to review and set aside an order of

the National Labor Relations Board issued against it, and the cross-application of the Board for enforcement of that same order. The Board's Decision and Order (D&O 1-2)<sup>1/</sup> was issued on April 30, 1976 and is reported at 223 NLRB No. 192. This Court has jurisdiction over the proceedings under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. 151, et. seq.), the unfair labor practice having occurred in New York City, within this judicial circuit.

#### I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that, while the Company experienced economic losses in its Service Department, its selection of James Thomas for inclusion in a layoff resulted from his efforts to obtain union representation for the Company's employees. The facts underlying the Board's findings are as follows:

##### A. Background

The Company sells and services cars in New York City (JD 2). It has three facilities - the Sales Department, the Service Department, and the Body Shop - all within a block of each other (Tr. 119). The Company

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<sup>1/</sup> Since the Appendix submitted by Petitioner has no page numbers, references will be made directly to the record materials. The Board's Decision and Order ("D&O") is at Tab K of the Appendix; the Administrative Law Judge's Decision ("JD") is at Tab H; the General Counsel's complaint ("Comp.") is at Tab B; the Company's Answer ("Ans.") is at Tab D; and the Transcript ("Tr."), the General Counsel's Exhibits ("GCX") and the Company's Exhibits ("RX") are at Tab L. References preceding a semicolon are to the Board's findings of fact; references following are to the evidence supporting those findings.



is run by three brothers: James Kiely, President and Manager of the Service Department; John Kiely, Vice-President and Supervising Chief Mechanic of the Service Department; and Thomas Kiely, Secretary and General Manager (JD 2-4; Comp. 2, Ans. 1, Tr. 14, 37, 123). Company decisions are usually made at meetings of the Kiely brothers every workday after close of business (Tr. 120, 124). The Company's work force is relatively small: at the time of the events in question, the Service Department had no more than 12 employees (JD 8; Tr. 15).

James Thomas was initially hired by the Company in June 1974 as the Service Department's service advisor-writer (JD 2; Tr. 13). The service advisor-writer is considered part of management by the Company, and is charged with writing up service requests, handling warranty claims, and acting as the Service Department's general liaison between the Company and its customers (JD 2, 7; Tr. 67, 99, 162, 168). In January 1975, Thomas resigned to pursue business plans of his own. These plans subsequently failed to work out, and in March 1975<sup>2/</sup> Thomas reapplied for work to Service Department Manager James Kiely (JD 2; Tr. 14, 162). At that time, Kiely informed Thomas that he could not return as the service advisor-writer because that position was filled, but that he was "capable" and could return as a Class A mechanic instead (JD 2; Tr. 14, 162, 65). Thomas accepted this offer and returned to work the following Monday (JD 2; Tr. 165). There was no indication that Thomas' rehire

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<sup>2/</sup> All dates hereafter mentioned refer to 1975 unless specified otherwise.



might be temporary (JD 8; Tr. 165). With Thomas' return, the Service Department included three Class A mechanics and five or six Class B or C mechanics, as well as the service advisor-writer (JD 2; Tr. 15).<sup>3/</sup> At all times, Thomas was the Class A mechanic with least seniority (JD 3; Tr. 16).

Following his rehire in March, Thomas performed his duties as Class A mechanic to the Company's satisfaction (JD 5; Tr. 156). In early May, he was the only employee sent by Service Department Manager James Kiely to a special two-day Fiat training course to gain the expertise the Service Department mechanics would need to handle various new car systems (JD 5; Tr. 42-43). Thomas brought back 20 or 30 pages of notes from the class. Kiely subsequently used these notes as an instruction manual for all the mechanics and was "very appreciative" of Thomas' contribution (Tr. 43, 59-60).

B. The Service Department Employees  
Agree to Obtain Union Represent-  
ation, and Thomas Joins Them

On the morning of Monday, May 12, five of Thomas' fellow mechanics informed him in the Service Department shop area that they had decided to sign up with a union. Thomas replied that he would sign up too.

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<sup>3/</sup> Class A mechanics are qualified to perform all mechanical jobs, such as motor maintenance and repair, transmission work, and electrical work. Class B or C mechanics are qualified to perform some of these jobs but not others. The Service Department also employs mechanics' helpers (JD 2-3; Tr. 15-16, 64).



(JD 3; Tr. 18-20). Class C mechanic Paul Sisto then announced that he was trying to contact a representative of the Union,<sup>4/</sup> and was chosen by the other men to do so (Tr. 20-21, 46). The men continued to discuss the advantages of representation during their coffee break and lunch hour and were eventually joined in these discussions by other Service Department employees (Tr. 19-21). In time, practically all of the Service Department employees expressed a desire for representation (Tr. 21). The employees continued throughout the week to discuss this desire in the shop area during work hours (JD 3; Tr. 22).

C. After the Company Decides to Lay Off Four Employees, Thomas Takes Charge of Employee Efforts to Obtain Union Representation; the Company Responds by Discriminatorily Selecting Thomas for Layoff

During the first four months of 1975, the Company incurred substantial economic losses in its operation of the Service Department (JD 5-6; Tr. 77-78, RX 1). On May 12, Company Accountant John Shea reported these losses to General Manager Thomas Kiely (JD 5; Tr. 78-79, 147-148). That evening, the Kiely brothers discussed the problem and decided to reduce losses in the Service Department by spacing out the relatively unprofitable warranty work and laying off possibly as many as six employees (JD 6; Tr. 94-95, 107-108, 126-128). James Kiely balked at losing this many employees in the Service Department, and

<sup>4/</sup> Local 239, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.



after further discussion during the next days, it was decided to lay off four employees: a Class A mechanic, a Class B mechanic, a Class C mechanic and the service-writer (JD 6; Tr. 102-103, 107, 108). James Kiely selected the individuals for layoff in each category (Tr. 103). It was not shown that the Company had a policy of basing layoffs or other personnel actions on seniority (JD 8). On Friday, May 16, James Kiely laid off Class B mechanic Hector Jimenez and Class C mechanic Paul Sisto (JD 6; Tr. 111). Sisto was the employee who had been selected by the Service Department employees to contact the Union (Tr. 20-21, 46).

Early on Monday, May 19, employees in the Service Department resumed their discussion of ways to obtain Union representation (JD 3; Tr. 23). In the absence of Sisto, who had been laid off the previous Friday, Thomas went to a Union steward in a car dealership across the street, announced the Service Department employees' desire to contact the Union, and obtained the telephone number of Union Representative Gerald Corallo. Thomas called Corallo during the lunch hour and arranged to meet with him that evening. (JD 3; Tr. 26-27.) Upon returning to work, Thomas encountered a number of the Service Department employees talking in the shop area. The employees asked if Thomas had contacted the Union. Thomas replied that he had reached Union Representative Corallo and had arranged to meet with him that evening (JD 3; Tr. 29-30).

On the evening of Monday, May 19, Thomas met with Corallo at the Union's offices. Thomas signed a Union authorization card,<sup>5/</sup> and arranged with Corallo that an organizational meeting would be held at the Union hall for all the Service Department employees. (JD 3; Tr. 30-31.)

On the morning of Wednesday, May 21, a group of Service Department employees informed Thomas that they were no longer interested in the Union (JD 3; Tr. 33-34).<sup>6/</sup> Shortly thereafter, at about 9:30 a.m., General Manager Thomas Kiely approached Thomas as he was working on a car, remarked, "Well, how long have you been in this country?"<sup>7/</sup> and walked away without a reply from Thomas (JD 3; Tr. 35). At about 10 a.m., Thomas spoke to Service Department Manager James Kiely during the coffee-break and announced that the Department employees had been thinking of obtaining Union representation, but were afraid of losing their work periods and had decided against it. Thomas said that he was the individual the employees had chosen to obtain union representation for them and make contact with a union, and that he wanted "to know about it" if Kiely was "mad or angry at [him]" or "had anything against [him] like laying [him] off." Kiely answered, "No, of course not, I'm not," and added that he was not laying Thomas or anyone else off. (JD 3-4; Tr. 35-36.)

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<sup>5/</sup> This card stated that Thomas accepted membership in the Union and authorized it to act as his collective-bargaining representative (GCX 2).

<sup>6/</sup> The Board made no findings as to why the employees became disenchanted with the Union movement (JD 3; Tr. 34).

<sup>7/</sup> Most of the Company's employees are immigrants (Tr. 129).



Around noon, Thomas finished work left incomplete by Sisto and Jiminez when they were laid off, went to the Service Department office, and asked Supervising Chief Mechanic John Kiely if there was any more work for him to do that day (JD 4; Tr. 37-39). Thomas explained that if there was no more work he wanted to go home, adding, "This has got nothing to do with union activity . . . I want to ship some fish out of state"<sup>8/</sup> (JD 4; Tr. 39). In the presence of a number of the Service Department employees, John Kiely responded, "No, at this time I have no other work for you. . . . My brother Jim is awful mad on you anyway. He decided on laying you off. . . . We're awful mad; my brother Jim is awful mad at you for your part in the union activities, in trying to bring a union in the shop. We don't want a union in the shop and never had. It has been tried in the past. and we don't want it" (JD 4; Tr. 39-40).<sup>9/</sup> John Kiely then indicated that Thomas would have to wait around until James Kiely arrived, and Thomas went into the shop area to collect his tools (JD 4; Tr. 39-41). Shortly thereafter, John Kiely called Thomas back into the office. James Kiely gave Thomas' final paycheck to John Kiely, who then handed it to Thomas. Thomas asked why he was being laid off; James Kiely replied, "Well, I am

<sup>8/</sup> Thomas apparently bred and raised tropical fish as a sideline (JD 4; Tr. 39).

<sup>9/</sup> In his concluding findings, the Administrative Law Judge inadvertently referred to the above statement as one made by "John Kiely to Thomas Kiely" (JD 8). The statement was rather made to employee James Thomas (JD 4; Tr. 39-40).

laying you off for economic conditions". (JD 5; Tr. 41). Since his May 21 layoff, Thomas has received no offer of reinstatement or other communications from the Company (JD 5; Tr. 41-42).

The Service Department's service advisor-writer was laid off on May 28, and a Class A mechanic resigned on June 25. Between May 16 and the hearing herein on December 4, the Company hired no Class A mechanics, and decreased the Service Department's total employee payroll (JD 7; RX 3, Tr. 62-63, 67, 70). The Company also upgraded its front end mechanic to perform some of the work previously performed by Thomas (JD 9; Tr. 64-65). However, on August 20, the Company hired a new mechanic at five dollars an hour, only 63 cents less than what it was paying Thomas at the time of his layoff (JD 9; Tr. 62-64).

## II. THE BOARD'S CONCLUSIONS AND ORDER

Upon the basis of the foregoing facts, the Board, in agreement with the Administrative Law Judge, concluded that the Company, in violation of Section 8(a)(3) and (1) of the Act, selected Thomas for layoff and refused to recall him because he engaged in protected union activities (D&O 1-2, JD 8-9, 10). The Board's order requires the Company to cease and desist from the unlawful conduct found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires the Company to offer Thomas reinstatement, to make him whole for any loss of earnings he suffered as a result of the unlawful conduct, and to post appropriate notices (D&O 2, JD 10-13).



ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY SELECTED JAMES THOMAS FOR LAYOFF AND REFUSED TO RECALL HIM BECAUSE HE LED EMPLOYEE EFFORTS TO OBTAIN UNION REPRESENTATION, THUS VIOLATING SECTION 8(a)(3) AND (1) OF THE ACT

It is well-settled that an employer may not use economic declines as an excuse for eliminating union activists from its work force. "Even though the employer may reduce its number of employees, it may not discriminate because of union activity in the selection of those to be terminated." N.L.R.B. v. Midwest Hanger Co., 474 F. 2d 1155, 1158 (C.A. 8, 1973). Accord: N.L.R.B. v. American Casting Service, 365 F. 2d 168, 171-172 (C.A. 7, 1966); N.L.R.B. v. Universal Manufacturing and Supply Co., 474 F. 2d 1272 (C.A. 4, 1973). Cf. Trico Products Corp. v. N.L.R.B., 489 F. 2d 347, 352-353 (C.A. 2, 1973) (timing of economic layoff accelerated by employees' protected concerted activities). In the present case, the Board found that, although the Company was undergoing an economic retrenchment in the Service Department, it selected James Thomas for layoff and refused to recall him because of his active promotion of the Union cause in the days preceding his layoff on May 21. The Board's finding of such unlawful motive is a factual one which "cannot lightly be overturned" (N.L.R.B. v. Advanced Business Forms Corp., 474 F. 2d 457, 464 (C.A. 2, 1973)), and may be "upset . . . only if there is not substantial evidence to support it." N.L.R.B. v. Milco, Inc., 388 F. 2d 133, 138 (C.A. 2, 1968). Accord: United Aircraft Corp. v. N.L.R.B., 440 F. 2d 85, 91-92



(C.A. 2, 1971); N.L.R.B. v. Gladding Keystone Corp., 435 F. 2d 129, 131-132 (C.A. 2, 1970). Furthermore, in determining the Company's motive, the Board was entitled to consider both direct evidence and "circumstantial evidence and 'inferences of probability drawn from the totality of other facts'" (N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F. 2d 292, 295 (C.A. 2, 1972), quoting N.L.R.B. v. Park Edge Sheridan Meats, Inc., 341 F. 2d 725, 728 (C.A. 2, 1965)), and if the inferences drawn by the Board are reasonable, the Court "may not substitute other inferences even though equally reasonable." N.L.R.B. v. J. W. Mays, Inc., 356 F. 2d 693, 698 (C.A. 2, 1966). Accord: N.L.R.B. v. Milco, Inc., supra, 388 F. 2d at 138; N.L.R.B. v. James Thompson & Co., 208 F. 2d 743, 746 (C.A. 2, 1953). Finally, even if the Company had valid economic grounds for reducing its work force generally, the Board's finding must be upheld as long as the selection of Thomas for layoff was motivated, wholly or "even partially", by his Union activities. N.L.R.B. v. George J. Roberts & Sons, Inc., 451 F. 2d 941, 945 (C.A. 2, 1971). See also, N.L.R.B. v. Advanced Business Forms Corp., supra, 474 F. 2d at 464; N.L.R.B. v. Savoy Laundry, Inc., 327 F. 2d 370, 371-372 (C.A. 2, 1964). Under these principles, the Board's Section 8(a)(3) findings regarding the Company's discriminatory selection of Thomas for layoff and refusal to recall him are entitled to affirmance.

As shown in the Counterstatement (supra pp. 4-6), James Thomas expressed support for the Union at the outset of the employees' discussions



regarding representation during the week of May 12 and subsequently, after the May 16 layoff of Paul Sisto, assumed the leading role in pursuing the employees' interest in obtaining representation. Thus, on May 19, with the tacit assent of his fellow Service Department employees, Thomas talked with a shop steward for the Union at a nearby car dealership and obtained the name and telephone number of Union Representative Corallo. During the lunch hour on May 19, Thomas telephoned Corallo and arranged a meeting with him that evening; and upon returning to the shop area, he announced the meeting with Corallo to his fellow employees. That evening, Thomas met with Corallo at the Union's offices, signed a Union authorization card and scheduled an organizational meeting for all the Service Department employees at the Union hall. In short, it is plain that Thomas assumed leadership of the employees' organizing efforts and, on May 19, took the first steps toward bringing about Union representation in the Service Department.

It is equally plain that the Company learned of Thomas' Union activities and swiftly reacted by choosing him to be laid off because of them. Initially, the record shows that most of the discussions regarding representation took place within the shop area of the 10 or 12-man Service Department, which was managed by President James Kiely and supervised directly by Vice-President John Kiely. Additionally, Thomas explicitly announced his prominent role in the organizing efforts to James Kiely at about 10 a.m. on May 21, the day of his layoff. Thomas specifically informed James Kiely that the employees had been thinking of obtaining union



representation and that he was the one they had chosen to carry out this task; he added that the employees had subsequently decided against having a union and asked whether the Company was angry or "had anything against [him] like laying [him] off" (JD 3-4; Tr. 35-36).<sup>10/</sup> James Kiely assured Thomas that the Company had no thought of laying him off. Nevertheless, only a few hours later, John Kiely informed Thomas that James Kiely was "awful mad" about Thomas' "part in the Union activities" and had decided

<sup>10/</sup> This finding was based on the credited testimony of James Thomas (JD 3-4). James Kiely's denial of this conversation, as well as James and Thomas Kiely's general denials of any knowledge of Union activity on May 21, was discredited by the Administrative Law Judge (JD 4 n. 2, 8). It is, of course, well settled that "questions of credibility are for the trier of fact and [this Court] will not upset the decision of the Board 'when it accepts a finding of an [Administrative Law Judge] . . . unless on its face it is hopelessly incredible or flatly contradicts either a so-called law of nature or undisputed documentary testimony. . .'" N.L.R.B. v. Warrensburg Board & Paper Corp., 340 F. 2d 920, 922 (C.A. 2, 1965) quoting N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (C.A. 2, 1952). Accord: MPC Restaurant Corp. v. N.L.R.B., 481 F. 2d 75, 77 (C.A. 2, 1973); N.L.R.B. v. John Langenbacher Co., Inc., 398 F. 2d 459, 461 (C.A. 2, 1968), cert. denied, 393 U.S. 1049.

The fact that Thomas' testimony as to the events of May 21 was not corroborated by other witnesses does not, contrary to the Company's claim (Br. 14, 16), detract from the Board's credibility findings. "The statement of a party, not inherently improbable or impossible, is entitled to the weight the trier of facts believes he should attach to it [and] needs no support or corroboration to achieve validity." N.L.R.B. v. Combined Century Theatres Inc., 278 F. 2d 306, 308-309 (C.A. 2, 1960) (citations omitted).

Nor does the fact that the testimony of Thomas was uniformly credited over that of the two Kielys where there was a conflict invalidate the Administrative Law Judge's credibility resolutions or indicate bias or prejudice on his part (Co. Br. 13, 18-19). "That the [Administrative Law Judge] always credited the employee version does not detract from the plausibility of each determination where, as here, good reasons are given for adopting that version." N.L.R.B. v. John Langenbacher Co., *supra*, 398 F. 2d at 461. See also, N.L.R.B. v. Pittsburgh Steamship Co., 337 U.S. 656, 659 (1949); N.L.R.B. v. Lewisburg Chair & Furniture Co., 230 F. 2d 155, 156 (C.A. 3, 1956).



to lay Thomas off (JD 4). All these circumstances -- Thomas' open Union activities in a small 10 or 12-man Department closely run on a day-to-day basis by the Kiely brothers, Thomas' May 21 disclosure of his leadership of the organizing efforts to James Kiely, and John Kiely's ensuing admission that James Kiely was "awful mad" at Thomas for his pro-Union role -- amply support the Board's conclusion (JD 6-7) that the Company knew of, and acted on, Thomas' Union activities when it selected him for layoff. See N.L.R.B. v. Long Island Airport Limousine Service Corp., 468 F. 2d 292, 295 (C.A. 2, 1972); N.L.R.B. v. Dorn's Transportation Co., 405 F. 2d 706, 713 (C.A. 2, 1969); N.L.R.B. v. United Mineral & Chemical Corp., 391 F. 2d 829, 833 (C.A. 2, 1968).<sup>11/</sup>

The Board's finding of unlawful motivation is strengthened by the "stunningly obvious timing" of the Company's decision to select Thomas for layoff. N.L.R.B. v. Rubin, 424 F. 2d 748, 750 (C.A. 2, 1970). As shown supra, p. 6, Thomas revealed that he was leader of the campaign to James Kiely at about 10 a.m. on May 21. In turn, Thomas was informed by John Kiely

<sup>11/</sup> The Company is incorrect in suggesting (Br. 19-20) that the Board relied entirely on the "small plant doctrine" in finding that the Company knew of the Union activities. As noted above, the Board's finding of knowledge is drawn from a number of factors, including but not limited to the open discussions of union representation occurring in the small Service Department. See N.L.R.B. v. Dorn's Transportation Co., Inc., supra, 405 F. 2d, at 711, 714 (knowledge inferred where activities were "open and extensive" and employees numbered no more than 50); N.L.R.B. v. Pembeck Oil Corp., 404 F. 2d 105, 110 (C.A. 2, 1968), vacated and remanded on other grounds sub nom. Atlas Engine Works, Inc. v. N.L.R.B., 395 U.S. 828 (knowledge inferred where most of activities occurred in plant during work hours and employees numbered only 15).



that James Kiely had decided to lay him off around noon -- only two hours later. Where an employee's layoff follows so swiftly upon revelation of his union activities, the inference is plainly justified that his layoff was motivated by those activities. See N.L.R.B. v. Rubin, supra, 424 F. 2d at 750; N.L.R.B. v. Pembeck Oil Corp., supra, 404 F. 2d at 110; N.L.R.B. v. Dorn's Transportation Co., supra, 405 F. 2d at 711, 714.

Finally, the Company's unlawful motivation is unmistakably revealed in John Kiely's statement informing Thomas of his layoff on May 21. Thus, the credited evidence shows that John Kiely announced Thomas' layoff with the following unequivocal explanation (JD 4; Tr. 39-40):<sup>12/</sup>

[A]t this time I have no other work for you. . . . My brother Jim is awful mad on you anyway. He decided on laying you off. . . . We're awful mad; my brother Jim is awful mad at you for your part in the union activities, in trying to bring a union in the shop. We don't want a union in the shop and never had. It has been tried in the past, and we don't want it.

This explanation amounts to "an outright confession of unlawful discrimination", and thus eliminates "any question concerning the merits" of Thomas' layoff "or other causes suggested as the basis" for the Company's action. N.L.R.B. v. Ferguson, 257 F. 2d 88, 92 (C.A. 5, 1958). See also, N.L.R.B. v. Armstrong Circuit, Inc., 462 F. 2d 355, 356, 358

<sup>12/</sup> The quoted explanation is based on Thomas' credited and uncontradicted testimony. The Company did not call John Kiely to testify (JD 4 n. 4).



(C.A. 6, 1972); N.L.R.B. v. John Langenbacher Co., supra, 398 F. 2d at 461; N.L.R.B. v. Globe Products Corp., 322 F. 2d 694, 695-696 (C.A. 4, 1963).

The Company contends (Br. 14, 20-21) that Thomas' selection for layoff had nothing to do with his role in the organizational effort and was attributable solely to the economic setbacks in the Service Department. The Board recognized that the Company had incurred serious losses in that Department and found nothing unlawful in the Company's decision to make some layoffs there (JD 5-6, 7). However, as the Board further found (JD 8), a number of factors controvert the claim that purely economic considerations motivated the Company to select Thomas for layoff on May 21. Initially, the Company has never contended that it selected Thomas for layoff because of any shortcomings in his performance as a Class A mechanic. Indeed, the Company could not seriously make such a contention in the face of the evidence showing that it considered Thomas a highly competent and valuable employee. Thus, the Company initially hired Thomas in the important management position of service advisor-writer, welcomed him back in March 1975 as a top-class mechanic, sent him to an advanced Fiat training course to gain expertise for the whole Department and was "very appreciative" of the notes he brought back as an instruction manual (supra, pp. 3-4). In light of this excellent work record, the Company cannot seriously advance job performance as the criterion for selecting Thomas for layoff. Additionally, the Company cannot point to Thomas' low seniority as a factor



in his selection, for there was no showing that the Company considers seniority in making layoff or other personnel decisions (JD 8). Similarly, the Company cannot claim, as it did at the hearing, that it selected Thomas for layoff in part because he had indicated his stay with the Company might be temporary, for the Administrative Law Judge specifically discredited James Kiely's testimony, which was emphatically denied by Thomas, that Thomas ever gave such an indication (JD 8). Finally, the Company's claim of economic motivation is belied by the fact that prior to his layoff, the Company never intimated that Thomas was among those who would be let go. Indeed, Thomas was assured by James Kiely on the morning of May 21 that he would not be laid off, and the announcement of Thomas' layoff, accompanied by expressions of anger and denunciation of unionism, came only several hours later, after James Kiely had had time to formulate a response to Thomas' revelation of his leading role in the representation effort. In light of these factors -- plainly controverting the alleged purely economic selection process -- it is evident that James Kiely's final statement that Thomas' layoff was "for economic conditions" (JD 5) was a belated attempt to cover the real, anti-union motives for the Company's action. In short, the record amply justified the Board in finding that the reason for selecting Thomas

for layoff was his role in the union activity and that the reasons advanced by the Company are no more than an attempt to "disguise an anti-union motive by speaking the language of economic necessity." N.L.R.B. v. Savoy Laundry, Inc., supra, 327 F. 2d at 372.<sup>13/</sup>

CONCLUSION

For all of the foregoing reasons, the Board respectfully submits that the petition for review should be denied and the Board's order should be enforced in full.

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<sup>13/</sup> The record also justified the Board's finding (JD 9) that Thomas' Union activities underlay the Company's refusal to recall him after his discriminatory layoff. As noted above (pp. 8), the Company made no effort after May 21 to recall Thomas or even communicate with him. Moreover, while the Company did not hire any more Class A mechanics after May 21, it did hire a mechanic on August 20 at \$5.00 an hour, only 63 cents an hour less than it had paid Thomas. In all these circumstances, it is a fair inference that the anti-union attitude which the Company so vigorously expressed in its layoff of Thomas was also responsible for its refusal to recall him from that layoff. Ken-Lee, Inc. v. N.L.R.B., 311 F. 2d 608, 611 (C.A. 5, 1962).



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

KIMI SALES, LTD.,	)	
	)	
Petitioner,	)	
	)	No. 76-4176
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Board's brief in the above-captioned case, have this day been served by first class mail upon the following counsel at the addresses listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 3rd day of December, 1976.